

Editor's note: Reconsideration granted; decision vacated -- See Heirs of Macauley Alakayak (On Reconsideration), 62 IBLA 90 (Feb. 25, 1982)

HEIRS OF MACAULEY ALAKAYAK

IBLA 75-507

Decided December 29, 1975

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting in part Alaska Native allotment application A-056093.

Affirmed.

1. Alaska: Native Allotments

There must be "substantially continuous use and occupancy of the land" by an Alaska Native allotment applicant to qualify such an applicant for an allotment.

APPEARANCES: Henry W. Cavallera, Esq., and Frederick Torrisi, Esq., of Alaska Legal Services Corp., Dillingham, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Macauley Alakayak (applicant) 1/ applied for two parcels of land (A-056093) pursuant to the Alaska Native Allotment Act, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed by 43 U.S.C. § 1617(a) (Supp. III, 1973), but saving pending applications). The Alaska State Office, Bureau of Land Management (BLM), in a decision dated March 28, 1975, rejected the application for parcel A and approved the application for parcel B. Heirs of the applicant appeal the rejection of parcel A, and will hereafter be referred to as appellants.

1/ Macauley Alakayak died on June 20, 1974. The appeal was filed by Anecia Alakayak and Henry Alakayak as heirs of the applicant.

The applicant filed his application for parcel A on October 27, 1961. On June 28, 1967, he filed a statement of use and occupancy listing a fish rack and tent frame as improvements, and seasonal fishing and trapping since 1961 as his use of the land. Parcel A consists of 109 acres where Igushik River flows into Amanaka Lake.

BLM conducted a field examination of parcel A on September 1, 1973. The field examiner was accompanied by the president of the Manokotak Village Council as guide. The field examiner reported that he found no evidence of use and occupancy on parcel A other than a deteriorated fish net and a boat owned by the State of Alaska Department of Fish and Game. The field examiner recommended rejection of the application.

The applicant was informed of the field examiner's recommendation and asked to supply additional evidence of use and occupancy. Following the applicant's death, appellants submitted several witness statements relating to parcel B. No evidence was submitted concerning parcel A.

Appellants present three arguments on appeal. First, appellants argue that the applicant's use of the land was consistent with Native customs and mode of living. Second, appellants argue that the application should be granted on the basis of two witness statements submitted on appeal. 2/ Third, appellants request an evidentiary hearing.

[1] The applicant asserted use of the land for fishing and trapping since at least 1961. Part of the fishing use is claimed to occur during the summer. Yet the field examiner was unable to find any evidence of use of the land on September 1. Nor did the field examiner discover any indication of past use, unlike parcel B

2/ Counsel for appellants were informed by the Chief Administrative Judge, Board of Land Appeals, in a letter dated September 24, 1975, that the Board will not give favorable consideration to new or additional evidence submitted for the first time on appeal in the absence of a satisfactory showing why the evidence was not submitted to BLM. Counsel here submitted no such showing within the 30-day period granted by the Board. However, favorable consideration of the witness statements would not change the result reached in this decision.

where a fish cache in disrepair was located. The only use for the land shown on the witness statements is fishing. No improvements or objects are indicated as being on the land, except, in one statement, old fish nets. Appellants have adopted for this appeal a brief describing Native customs and mode of living in the Bristol Bay area. We do not doubt that the applicant engaged in subsistence fishing. However, appellants have failed to demonstrate the connection between parcel A and the applicant's fishing activity.

The brief depicts subsistence fishing as placing a net in the river and waiting for the tide to carry the fish into it. The fish are then removed and taken "by skiff or other transportation" to a place for cleaning, drying and smoking. The "fish can be smoked on site or at the village."

Nevertheless, the statements in this case do not show that the land was actually used for any activity relating to fishing which would demonstrate substantial use and occupancy of the site. To obtain an allotment, the applicant must show "substantial actual use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 2561.0-5(a). "In considering the nature and extent of such use and occupancy, the Native customs and mode of living * * * will be considered." Maxie Wassillie, 17 IBLA 416, 417 (1974). Even considering the Native customs regarding fishing as asserted in the brief, we cannot find substantial actual occupancy and use of the land, at least potentially exclusive of others, as required by 43 U.S.C. § 270-3 (1970) and the regulations. 3/

With respect to appellants' request for a hearing, sufficient opportunities were given for information to be submitted to support the application. Appellants have not offered any evidence or made a tender of proof which indicates a hearing would produce a different result. See Elsie Bergman, 22 IBLA 233, 236-37 (1975); Beulah Moses, 21 IBLA 157, 158-59 (1975). The request for a hearing is denied.

3/ Moreover, there is nothing to indicate that the applicant required 109 acres for his fishing activity. Had appellants been able to demonstrate the necessary use and occupancy of the land, consideration would have been given to limiting the allotment to the smallest legal subdivision. Hilma Eakon, 22 IBLA 41 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Edward W. Stuebing
Administrative Judge

